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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-331

STATE OF NEW MEXICO AND HAROLD F. OLSON,
Individually and as Director, New Mexico
Department of Game and Fish,
Petitioners,

v.

MESCALERO APACHE TRIBE,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF OF PETITIONERS

PAUL BARDACKE
Attorney General of New Mexico

THOMAS L. DUNIGAN
Special Assistant Attorney General

P.O. Drawer 1508
Santa Fe, New Mexico 87501
(505) 827-6000

Attorneys for Petitioners

Of Counsel:

PAUL A. LENZINI
CHAPMAN, DUFF AND PAUL
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 624-8800

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
Neither 18 U.S.C. § 1165 nor the Lacey Act Amendments of 1981, 16 U.S.C. §§ 3371 et seq., preempt state authority to regulate non-Indian hunting and fishing on the Mescalero Apache Reservation.	1
A. 18 U.S.C. §1165	2
B. Lacey Act Amendments of 1981, 16 U.S.C. §§ 3371 et seq.	5
CONCLUSION	7

TABLE OF AUTHORITIES

	Page
CASES:	
Confederated Tribes of the Colville Indian Reservation v. *State of Washington*, 591 F.2d 89 (9th Cir. 1979)...	6
Eastern Band of Cherokee Indians v. *North Carolina Resources Commission*, 588 F.2d 75 (4th Cir. 1978), petition for cert. dismissed, 446 U.S. 960 (1980).....	5
Montana ex rel. Nepstad v. *Danielson*, 149 Mont. 438, 427 P.2d 689 (1967).....	4
Montana v. *United States*, 450 U.S. 544 (1981).....	4,5
Oliphant v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978).....	4
United States v. *Finch*, 548 F.2d 822 (9th Cir. 1976).....	4
United States v. *Montana*, 604 F.2d 1162 (9th Cir. 1979), rev'd, *Montana* v. *United States*, 450 U.S. 544 (1981).....	6
United States v. *Sanford*, 547 F.2d 1085 (9th Cir. 1976)	4
STATUTES:	
Act of July 12, 1960, 74 Stat. 469, 18 U.S.C. § 1165.....	1,2,3, 4,5,6
Lacey Act Amendments of 1981, 95 Stat. 1073, 16 U.S.C. §§ 3371 *et seq.*.....	1,5,6
MISCELLANEOUS:	
58 I.D. 331 (1943).....	5
S. Rept. No. 97-123, 97th Cong., 1st Sess. (1981).....	6
S. Rept. No. 1686, 86th Cong., 2d Sess. (1960).....	4

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ARGUMENT

Neither 18 U.S.C. § 1165 Nor The Lacey Act Amendments of 1981, 16 U.S.C. §§ 3371 et seq., Preempt State Authority to Regulate Non-Indian Hunting And Fishing on The Mescalero Apache Reservation.

The Brief of Respondent raises two matters which were not addressed in the Brief of Petitioners and thus warrant a short reply. The Mescalero Apache Tribe claims that 18 U.S.C. § 1165 and the Lacey Act Amendments of 1981, 16 U.S.C. §§ 3371 et seq., provide federal sanctions for violation of the terms and conditions which may be established by an Indian tribe for hunting and fishing on tribal trust lands, and thus State regulation of non-Indian hunting and fishing on tribal trust lands has been displaced as a consequence.

A. 18 U.S.C. § 1165.

While recognizing that the decision of the Tenth Circuit in this case did not give preemptive effect to 18 U.S.C. § 1165, the Brief of Respondent argues that this provision "is deserving of more weight in the scale than it was accorded" as a preemptive measure. Respondent's Brief at 34-35. The Tribe asserts that 18 U.S.C. § 1165 constitutes Congressional recognition of tribal authority to establish terms and conditions for hunting and fishing on reservation trust land and provides federal criminal penalties for a violation of any such tribal conditions. The Brief of Respondent refers to the legislative history of 18 U.S.C. § 1165, which explains that this statute was intended to fill a void in present law with respect to the protection of Indian property, and draws the extraordinary conclusion that Section 1165 is thus an indication "that Congress assumed that the States had no jurisdiction over hunting and fishing on tribal lands." Respondent's Brief at 35.

The conclusion of the Mescalero Apache Tribe in this regard is simply wishful thinking. 18 U.S.C. § 1165 states only that a federal criminal penalty may be imposed against any person who:

> ... without lawful authority or permission willfully and knowingly goes upon any land that belongs to any Indian or Indian tribe ... for the purpose of hunting, trapping or fishing thereon ....

Clearly and simply, Section 1165 is merely a criminal trespass statute. It is not an attempt by Congress to enter the field of hunting and fishing regulation on Indian reservations, nor is it a "recognition by Congress of tribal authority to set terms and conditions for hunting and fishing on the Reservation" and a means by which those conditions may be enforced by the tribe or by the United States.

The terms of the statute do not allow such a construction. The only act prohibited by the statute is entering an Indian reservation to hunt or fish without tribal permission. While this prohibition may be sufficient, with the federal government's assistance, to enforce a tribal permit requirement, there are

numerous other conservation restrictions of critical importance to game and fish management which the statute could not be used to enforce. These include, for example, bag limits, limits on sex of kill, weapons and ammunition restrictions, prohibitions on negligent use of weapons and of fire, and prohibitions against habitat destruction through off-road vehicle use and similar regulations. The statute simply does not evince a comprehensive scheme of game and fish regulation which leaves no room for state jurisdiction.

The legislative history of Section 1165 confirms the plain meaning of the statute. The Senate Report on Section 1165 states with respect to the law's purpose:

> The problem confronting Indian tribes with sizable reservations is that the United States provides no protection against trespassers comparable to the protection it gives to federal property as exemplified by Title 18, United States Code, Section 1863 [trespass on national forest lands]. Indian property owners should have the same protection as other property owners. For example, a private hunting club may keep nonmembers off its game lands or it may issue a permit for a fee. One who comes on such lands without permission may be prosecuted under state law but a non-Indian trespasser on an Indian reservation enjoys immunity. This is by reason of the fact that Indian tribal law is enforcible against Indians only; not against non-Indians.
>
> State laws are of little aid to the Indians in this matter. While non-Indians are subject to state laws when they go on Indian reservations, many of the states do not have criminal trespass laws and in other states the Indians find it most difficult to comply with the requirements of state laws designed to control trespass. Particularly is this true in cases of the so-called closed or unallotted Indian reservations in States where the state law requires each 25 square acres to be closed or posted.
>
> * * *

> Non-Indians are not subject to the jurisdiction of Indian courts and cannot be tried in Indian courts on trespass charges. Further there are no federal laws which can be invoked against trespassers.
>
> * * *
>
> The Committee has considered this bill and believes that the legislation is meritorious. The legislation will give to the Indian tribes and to individual Indian owners certain rights that now exist as to others, and fills a gap in the present law for the protection of their property.

S. Rept. No. 1686, 86th Cong., 2d. Sess., 2-3 (1960).

It is evident from the legislative history of Section 1165 that the statute is only a criminal trespass provision. Relying on this history, the Ninth Circuit Court of Appeals has held:

> . . . 18 U.S.C. 1165 does not represent an attempt by the federal government to enter the arena of fish and game regulation on Indian reservations; the federal statute cannot be viewed as a prohibiting or conflicting act.

U.S. v. Sanford, 547 F.2d 1085, 1089 (9th Cir. 1976). See also *U.S. v. Finch,* 548 F.2d 822 (9th Cir. 1976). The *Sanford* decision found persuasive the Montana Supreme Court's interpretation of Section 1165:

> We hold that a statute which provides a penalty for trespass to the possessory rights of reservation Indians does not conflict with fish and game regulation by the State of Montana.

Montana ex rel Nepstad v. Danielson, 149 Mont. 438, 427 P.2d 689 (1967). This Court confirmed the *Sanford* decision's interpretation in *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978), when it characterized Section 1165 as a statute designed to provide Indians with federal protection from intruders. 435 U.S. at 205. Moreover, in *Montana v. United States,* this Court referred, in turn, to its decision in *Oliphant*

and noted that the decision there "would seriously restrict the ability of a tribe to enforce any purported regulation of non-Indian hunters and fishermen." 450 U.S. at 565, n.14.

Finally, even the Solicitor of the Department of the Interior has likewise recognized that a criminal trespass statute relating to Indian country (not specifically Section 1165) could not be made into a mechanism for enforcing particular conservation regulations because its purpose was plainly designed to punish trespass. 58 I.D. 331, 347 (1943).

B. Lacey Act Amendments of 1981, 16 U.S.C. §§ 3371 et seq.

The Brief of Respondent also points to the Lacey Act Amendments of 1981, 16 U.S.C. §§ 3371 et seq., as a means by which tribal hunting and fishing regulations may be enforced against non-Indians, thus displacing the utility of State regulations.

While the 1981 amendments to the Lacey Act may increase the ability of the federal government to enforce particular tribal hunting and fishing regulations, 16 U.S.C. 3772(a)(1), these amendments do not confer upon an Indian tribe any additional authority over non-Indian hunters and anglers, nor does it displace state hunting and fishing regulations pertaining to non-Indians who hunt or fish on tribal lands.

On the contrary, the 1981 amendments to the Lacey Act specifically provide that the Act shall not be construed as diminishing the authority of any State to regulate the activities of persons within an Indian reservation. 16 U.S.C. § 3378(c)(3). Indeed, as the legislative history plainly states:

> Section 9(c)(3) provides that nothing in this Act shall be construed as enlarging or diminishing the authority of any State or Indian tribe to regulate the activities of persons within the Indian reservations. The Committee recognizes that there is a continuing controversy about the extent of State and tribal jurisdiction over resources within Indian reservations and regarding non-Indians on those reservations. *Compare, Eastern Band of Cherokee Indians* v. *North*

> *Carolina Resources Comm'n*, 588 F. 2d 75 (4th Cir. 1978), petition for cert. dismissed, 446 U.S. 960 (1980), *with U.S.* v. *Montana*, 604 F. 2d 1162 (9th Cir. 1979), and *Confederated Tribes of the Coville Indian Reservation* v. *State of Washington*, 591 F. 2d 89 (9th Cir. 1979). Nothing in this Act is intended to preempt whatever jurisdiction individual States may have over resources within Indian reservations under existing law, nor is it intended to alter or change the existing authority of Indian tribes over resources within their reservations.

S. Rept. No. 97-123, 97th Cong., 1st Sess., 1765 (1981).

Accordingly, contrary to the claims of the Mescalero Apache Tribe, neither 18 U.S.C. § 1165 nor the Lacy Act Amendments of 1981, 16 U.S.C. §§ 3371 et seq., deprive the State of New Mexico of jurisdiction to regulate non-Indian hunting and fishing on the Mescalero Apache Reservation.

CONCLUSION

For all the reasons set forth above and in the Brief of Petitioners previously filed in this proceeding, the decision of the court of appeals should be reversed.

Respectfully submitted,
Paul Bardacke
Attorney General of New Mexico
Thomas L. Dunigan
Special Assistant Attorney General
P.O. Drawe. 1508
Santa Fe, New Mexico 87501
Tel. (505) 827-6000
Attorneys for Petitioners

Of Counsel:

Paul A. Lenzini, Esq.
Chapman, Duff and Paul
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

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